Supreme Court of the United States.

OCTOBER TERM, 1906.

NO. 513.

W. H. GAZLAY, H. F. GAZLAY, HULDA G. MILLER, EMMA G. DONALDSON, JULIA G. STEWART and CLARA G. KUHN,

Petitioners,

vs.

FLETCHER R. WILLIAMS, as Trustee in Bankruptcy for HARRY D. BROWN, a Bankrupt,

Respondent.

Motion for a Writ of Certiorari.

Now come W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn, by Oscar W. Kuhn, their counsel, and move this Honorable Court that it shall, by certiorari or other proper process directed to the Honorable Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the said W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn were appellants and the said Fletcher R. Williams, as Trustee in Bankruptcy for Harry D. Brown, a bankrupt, was appellee; and to that end they now tender herewith their petition upon the certified copy of the entire record in said cause in said Court of Appeals and now here before this Honorable Court in said cause, numbered 513 on the docket of this Court.

OSCAR W. KUHN, Counsel.

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Petitioners,

vs.

FLETCHER R. WILLIAMS, as Trustee in Bankruptcy for HARRY D. BROWN, a Bankrupt,
Respondent.

Petition of W. H. Gazlay, H. F. Gazlay, Hulda G. Miller, Emma G. Donaldson, Julia G. Stewart and Clara G. Kuhn for a writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, requiring it to certify to the Supreme Court of the United States for its revision and determination the appeal in bankruptcy taken by said petitioners herein against the respondent herein, in the matter of W. H. Gazlay et al., appellants, vs. Fletcher R. Williams, as Trustee in bankruptcy for Harry D. Brown, Bankrupt, appellee, lately depending in the said Court of Appeals.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the above-named petitioners respectfully shows and states:

First. That on the 16th day of July, 1902, the above-named petitioners executed to one J. D. Kueny a lease for ten years, with privilege for ten years additional, on certain premises in the city of Cincinnati, Ohio; that on the 9th day of April, 1904, they brought suit against said J. D. Kueny for rent due under said lease and for the sale of said leasehold estate, subject to all of the terms, covenants and conditions contained in said lease; that in said proceedings said leasehold estate was sold to one Harry D. Brown, who took possession and paid the rent under said lease to petitioners until the institution of the proceedings in bankruptcy against him in January, 1905; that in said bankruptcy proceedings the respondent herein was duly elected and qualified as the trustee in bankruptcy for said Harry D. Brown, and as such elected to

assume and administer as a part of the assets of said bankrupt the unexpired term of said lease.

Second. That the above-named respondent as such trustee in bankruptcy did, on the first day of March, 1906, file in the office of the Clerk of the District Court of the United States for the Southern District of Ohio, Western Division, sitting in bankruptcy in Cause No. 3775, entitled Emil Huttenbauer et al., plaintiffs, vs. Harry D. Brown, bankrupt, defendant, his certain application, asking for the sale of said leasehold estate, and alleging that the said petitioners herein and others were claiming interests in said leasehold estate adverse to that of the said respondent herein as trustee of the said Harry D. Brown, and asking that they be made parties to said application and required to set up their said claims, or be forever barred from asserting same.

Third. That said petitioners filed a motion in said proceeding to be dismissed as parties to said proceeding on the ground of want of jurisdiction in said Court over their persons, which motion the referee in bankruptcy overruled and to which action of the referee they took exception. That thereupon they filed their answer, in which they alleged that they had no interest in said leasehold estate except in the event of a sale of same by said trustee, when they would have the right to forfeit same by virtue of a covenant contained in said lease providing that in case the lessee's interest in said lease should be sold under execution or other legal process without the written consent of said lessors first had, it would be lawful for lessors (petitioners) into said premises to re-enter and to have again, re-possess and enjoy as in their former estate; and thereupon the lease should cease, determine and be utterly void, and again asking to be dismissed as parties to said proceeding.

Fourth. That upon a hearing by said referee of said application, the answers thereto of these petitioners, and an agreed statement of facts as evidence, it was held that said Court had jurisdiction over the persons of these petitioners, and that the trustee in bankruptcy, the respondent herein, had the right to sell said leasehold estate discharged of the said condition against forfeiture.

Fifth. That your petitioners thereupon filed with said referee a petition to review his said findings and order, and said referee certified the said proceedings, evidence and exhibits to the Judge of the District Court of the United States for the Southern District of Ohio, Western Division, in bankruptcy, who, upon hearing, affirmed the findings of the said referee, holding that said Court had jurisdiction in the matter and that the trustee had the right to sell said leasehold estate free of any right on the part of these petitioners to forfeit same for the reason that there was no provision in said lease for a forfeiture of it in the event of a sale by the trustee in bankruptcy of lessee, and that therefore a sale by respondent herein would violate no covenant in said lease.

Sixth. That, feeling themselves aggrieved by this judgment and

believing that under the provisions of the Bankruptcy Act and the decisions of this Honorable Court in several cases, the right was given them to do so, your petitioners appealed from this judgment of the District Court, to the United States Circuit Court of Appeals for the Sixth Circuit, where the cause was heard upon the same pleadings, exhibits and evidence without objection as to the appeal, and where the judgment of the District Court was affirmed.

Seventh. That your petitioners, again feeling themselves aggrieved by this judgment of said Circuit Court of Appeals, and believing that by virtue of the decisions of this Court they had the right to appeal from said judgment to this honorable Court, did, on the 6th day of December, 1906, file in this Court their appeal from the said judgment of the said Circuit Court of Appeals, together with their assignment of errors and the transcript of the record in said case, and same has been docketed in this Court as Cause No. 513 of the October, 1906, Term of this Court, and the record in said cause has been printed and is now on file in said cause.

Eighth. That while your petitioners believe that the questions to be determined in this cause as between themselves and the respondent herein are "a controversy arising in a bankruptcy proceeding" as distinguished from a mere "proceeding in bankruptcy," and that therefore their appeals from the District Court to the Circuit Court of Appeals and from the Circuit Court of Appeals to this Court were correctly taken, nevertheless, as the matter is not entirely free from doubt, it is respectfully prayed that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in said case, therein entitled W. H. Gazlay et al., appellants, vs. Fletcher R. Williams, Trustee, appellee, and that the record in said cause, numbered 513, now on file in the office of the Clerk of this Court, and printed as aforesaid, be considered by this Court as the return to this writ, and that said case may be reviewed and determined by this Court under this proceeding in case this Court should decide that petitioners had no right to come to this Court by way of appeal.

Your petitioners further allege that they assign for errors in said decree and the proceedings of said Circuit Court of Appeals the following:

First: Said Court erred in affirming the judgment of the District Court of the United States for the Southern District of Ohio, Western Division, in Bankruptcy, in holding that your petitioners would have no right to forfeit the lease of said Harry D. Brown in the event of a sale of same under the application of said respondent herein, for the reasons: First, that said respondent was not expressly named in the prohibition against alienation contained in said lease; and, second, that your petitioners, by their proceedings against J. D. Kueny in the Superior Court of Cincinnati, in which said leasehold was sold to

Harry D. Brown, the bankrupt, had forever discharged the lease from the condition contained in it, providing for a forfeiture of it in case the lessee's interest should be sold on execution or other legal process, without the consent in writing of the lessors first had.

Second. Said Court also erred in affirming the judgment of said District Court in holding that the trustee in bankruptcy herein was entitled to sell said leasehold estate clear and free from any claim or right on the part of your petitioners to forfeit the same in the event of a sale of same by said trustee under his said application.

Wherefore, these petitioners pray that upon a hearing of this cause by this Court the findings and decree of said Circuit Court of Appeals may be reversed and held for naught and that this Court may enter such decree as is proper.

W. H. GAZLAY,
HANNA F. GAZLAY,
HULDA G. MILLER,
EMMA G. DONALDSON,
JULIA G. STEWART,
CLARA G. KUHN,
By OSCAR W. KUHN, *their attorney.*

STATE OF OHIO, County of Hamilton, ss:

W. H. Gazlay, being first duly sworn, says that he is one of the petitioners above named; that he has read the foregoing petition and knows the contents thereof, and the facts herein stated are true to his own knowledge, except as to such matters as are therein stated on his information and belief, and as to these he believes them to be true.

W. H. GAZLAY.

Subscribed and sworn to before me this 31st day of May, 1907.

A. J. FREIBERG,
Notary Public in and for Hamilton County, Ohio.

[NOTARIAL SEAL.]